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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

GRACIELA HERRERA; and RUBEN
ORDAZ,

Plaintiffs,

vs.

ALEJANDRO DOWNEY,

Defendant.

Case No. CV 16-02719 DSF (SKx)

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case.

A copy of these instructions will be sent with you to the jury room when you deliberate.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

INSTRUCTION NO. 2

When a party has the burden of proof on any claim by a preponderance of evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

INSTRUCTION NO. 3

The evidence you are to consider in deciding what facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I may instruct you to accept as proved.

INSTRUCTION NO. 4

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and at other times, and will say in their closing arguments, is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
- (3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony was received only for a limited purpose; when I instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.
- (4) Anything you may see or hear when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 5

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a garden hose that's turned on, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

INSTRUCTION NO. 6

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) The opportunity and ability of the witness to see or hear or know the things testified to;
- (2) The witness's memory;
- (3) The witness's manner while testifying;
- (4) The witness's interest in the outcome of the case, if any;
- (5) The witness's bias or prejudice, if any;
- (6) Whether other evidence contradicted the witness's testimony;
- (7) The reasonableness of the witness's testimony in light of all the evidence; and
- (8) Any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some

1 things but told the truth about others, you may accept the part you think is true and
2 ignore the rest.

3 The weight of the evidence as to a fact does not necessarily depend on the
4 number of witnesses who testify. What is important is how believable the witnesses
5 were, and how much weight you think their testimony deserves.

INSTRUCTION NO. 7

A language other than English has been used during the trial. The evidence to be considered by you is only that provided through the official court interpreter. Although some of you may know the Spanish language, it is important that all jurors consider the same evidence. Therefore, you must accept the English interpretation. You must disregard any different meaning.

You must not make any assumptions about a witness or party based solely on the use of an interpreter to assist that witness or party.

INSTRUCTION NO. 8

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 9

The plaintiffs bring their claims under a federal statute that provides that any person or persons who, under color of law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

INSTRUCTION NO. 10

In order to prevail on their claim for excessive force against Officer Downey, the plaintiffs must prove each of the following elements by a preponderance of the evidence:

1. Officer Downey acted under color of law; and
2. The acts of Officer Downey deprived Ruben Herrera of his particular rights under the United States Constitution as explained in later instructions.

A person acts “under color of law” when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The parties have stipulated that Officer Downey acted under color of state law.

If you find the plaintiffs have proved each of these elements, and if you find that the plaintiffs have proved all the elements they are required to prove under the instructions for excessive force, your verdict should be for the plaintiffs on that claim. If, on the other hand, the plaintiffs have failed to prove any one or more of these elements, your verdict should be for the defendant on that claim.

INSTRUCTION NO. 11

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force in making a lawful arrest or defending himself. Therefore, in order to prove an unreasonable seizure by excessive force in this case, the plaintiffs must prove by a preponderance of the evidence that Officer Downey used excessive force against Ruben Herrera when he shot him.

Under the Fourth Amendment, an officer may only use such force as is “objectively reasonable” under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer’s subjective intent or motive is not relevant to your inquiry.

In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including:

1. The nature of the crime or other circumstances to which the officer was responding or other circumstances known to the officer at the time the force was applied;
2. Whether Ruben Herrera posed an immediate threat of death or serious bodily injury to the officer or others;
3. Whether Ruben Herrera was actively resisting arrest or attempting to evade arrest by flight;
4. The amount of time Officer Downey had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;
5. The type and amount of force used;

- 1 6. The availability of alternative methods to take Ruben Herrera into
- 2 custody;
- 3 7. Whether it was practical for Officer Downey to give warning of the
- 4 imminent use of force, and whether such warning was given.
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INSTRUCTION NO. 12

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs on any of the plaintiffs' claims, you must determine the plaintiffs' damages. Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiffs for any injury you find was caused by the defendants.

You should consider the following as to Ruben Herrera's damages:

1. The nature and extent of his injuries;
2. The loss of enjoyment of life experienced; and
3. The mental, physical, and emotional pain and suffering experienced prior to death.

You should consider the following as to the damages for Graciela Herrera and Ruben Ordaz:

1. The loss of Ruben Herrera's love, companionship, comfort, care, assistance, affection, society, and moral support.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

INSTRUCTION NO. 13

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. 14

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

INSTRUCTION NO. 15

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it, although I have no information that there will be news reports about this case; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

1 These rules protect each party's right to have this case decided only on
2 evidence that has been presented here in court. Witnesses here in court take an oath
3 to tell the truth, and the accuracy of their testimony is tested through the trial
4 process. If you do any research or investigation outside the courtroom, or gain any
5 information through improper communications, then your verdict may be influenced
6 by inaccurate, incomplete or misleading information that has not been tested by the
7 trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if
8 you decide the case based on information not presented in court, you will have
9 denied the parties a fair trial. Remember, you have taken an oath to follow the rules,
10 and it is very important that you follow these rules.

11 A juror who violates these restrictions jeopardizes the fairness of these
12 proceedings, and a mistrial could result that would require the entire trial process to
13 start over. If any juror is exposed to any outside information, please notify the court
14 immediately.

INSTRUCTION NO. 16

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.